No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE G. ERIC BRUNSTAD JR. IN SUPPORT OF PETITIONER

G. Eric Brunstad, Jr.
Counsel of Record
Kate M. O'Keeffe
Phillip A. Spinella
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

STATEMENT 5

SUMMARY OF THE ARGUMENT 10

ARGUMENT 15

A. Congress's Intent In Enacting The Current Bankruptcy Code Was To Encourage Chapter 13 Filings..... 15

B. One Important Way That Section 348(f) Encourages Chapter 13 Filings Is By Ensuring That Debtors Are Not Penalized By Conversion From Chapter 13 To Chapter 7. 18

C. The Decision Below Is In Direct Conflict With The Purpose Behind Section 348(f). 25

D. The Decision Below Conflicts With the Principle that Chapter 13 Proceedings Are Strictly Voluntary. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Alabama,
219 U.S. 219 (1911) 28

Cent. Va. Cmty. Coll. v. Katz,
546 U.S. 356 (2006) 16

Clyatt v. United States,
197 U.S. 207 (1905) 15, 28

Farmer v. Taco Bell Corp.,
242 B.R. 435 (W.D. Tenn. 1997) 24

In re Alexander,
236 F.3d 431 (8th Cir. 2001) 25

In re Bobroff,
766 F.2d 797 (3d Cir. 1985) 12, 13, 19, 23

In re Boggs,
137 B.R. 408 (Bankr. W.D. Wash. 1992) 19

In re Brinkley,
323 B.R. 685 (Bankr. W.D. Ark. 2005) 13, 23, 24

In re Calder,
973 F.2d 862 (10th Cir. 1992) 21

In re Lybrook,
951 F.2d 136 (7th Cir. 1991) 12, 20, 21

TABLE OF AUTHORITIES
(continued)

Page

In re Morrison,
403 B.R. 895 (Bankr. M.D. Fla. 2009) 24

In re Pearson,
214 B.R. 156 (Bankr. N.D. Ohio 1997) 23

In re Sandoval,
103 F.3d 20 (5th Cir. 1997) 24

In re Sargente,
202 B.R. 1023 (Bankr. S.D. Fla. 1996) 23

In re Stamm,
222 F.3d 216 (5th Cir. 2000) 23

In re Stillwaggon,
No. 10-bk-12289, 2014 WL 1087898 (Bankr.
M.D. Fla. March 19, 2014) 24

In re Young,
66 F.3d 376 (1st Cir. 1995) 23

The Civil Rights Cases,
109 U.S. 3 (1883) 27

Taylor v. Burns,
344 B.R. 523 (W.D. Ky. 2004) 24

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTION AND FEDERAL STATUTES

U.S. CONST. amend. XIII, § 1 27

11 U.S.C. § 109(e) 11

11 U.S.C. § 301(b) 18

11 U.S.C. § 303(h) 18

11 U.S.C. § 348(a) 18, 20

11 U.S.C. § 348(f) ..... *passim*

11 U.S.C. § 348(f)(1)(A) 21

11 U.S.C. § 348(f)(2) 21

11 U.S.C. § 541(a) ..... passim

11 U.S.C. § 701 16

11 U.S.C. § 704 16

11 U.S.C. § 726 16

11 U.S.C. § 1306 ..... 6, 16

11 U.S.C. § 1307(a) 6, 12, 18

11 U.S.C. § 1322(d) 16

11 U.S.C. § 1325(a)(4) 16

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

H.R. REP. 103-835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340 ..... 13, 22

H.R. REP. 95-595 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963 ..... *passim*

S. REP. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 15, 28

INTEREST OF THE AMICUS CURIAE[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at the New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy, secured transactions, business reorganizations and international insolvency law, commercial transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. A copy of each party's consent is filed herewith.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Wellness International Network, Ltd. v. Sharif*, 13-935 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel,*

LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 562 U.S. 61 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The purpose of this brief is to address matters that bear on the Court's determination of an important and recurring bankruptcy issue: when a bankruptcy case is converted from Chapter 13 to Chapter 7, whether undistributed post-petition wages held by the Chapter 13 trustee should be returned to the debtor or distributed to creditors in accordance with the debtor's defunct Chapter 13 plan. In particular, the brief explains that section 348(f) of the Bankruptcy Code demonstrates Congress's intent that, following conversion, both debtors and creditors should be placed in the same economic position that they would have been in had the case been filed under Chapter 7 from the outset. Because a debtor's post-petition wages are not part of the Chapter 7 estate available to creditors, undistributed post-petition wages held by a Chapter 13 trustee should be distributed to the debtor and not to creditors following conversion of the case. This furthers Congress's intent to encourage debtors to at least attempt a

repayment plan under Chapter 13, rather than pursue liquidation under Chapter 7, by ensuring that debtors are not penalized for filing a Chapter 13 petition if they ultimately convert the case to Chapter 7.

Critically, returning undistributed post-petition wages to debtors upon conversion to Chapter 7 also serves to reinforce the strict voluntariness of the Chapter 13 process and the important constitutional value that the principle of voluntariness serves: under the Thirteenth Amendment, insolvent debtors cannot be forced involuntarily to work to pay off their debts. Unlike Chapter 13, Chapter 7 is not strictly voluntary—creditors may place a debtor into Chapter 7 against the debtor's will, either initially or by requesting conversion of the debtor's case from a proceeding under some other chapter. Further, a court may keep a debtor in Chapter 7 involuntarily by denying the debtor's motion to dismiss. Given that Chapter 7 cases may proceed involuntarily, Congress has determined that, consistent with Constitutional principles, the fruits of a debtor's human capital in the form of the debtor's post-petiton wages are not included as part of the Chapter 7 estate. Protecting this value, Congress has likewise determined that, when a case is converted from Chapter 13 to Chapter 7, undistributed funds from the defunct Chapter 13 case (which funds will be derived from the debtor's post-petition wages in almost every instance) are also

excluded from property of the Chapter 7 estate, and become property of the debtor. In this way, Congress has assured that a debtor's post-petition contribution of wages to the bankruptcy process remains strictly voluntary. The undersigned argues that the decision below should be reversed and the Court should hold that post-petition wages held by the Chapter 13 trustee at the time of conversion are the rightful property of the debtor.

STATEMENT

Petitioner Charles E. Harris, III (Harris) filed for bankruptcy relief under Chapter 13 of the Bankruptcy Code on February 24, 2010. Pet. App. 30a. At the time he filed his bankruptcy petition, Harris was $3,700 behind on his home mortgage loan. Pet. App. 3a. Under Harris's proposed Chapter 13 plan, he agreed to make his regular monthly mortgage payments in order to keep the home. Pet. App. 4a. In addition, his plan provided that the Chapter 13 trustee, Respondent Mary K. Viegelahn (Viegelahn), would, for a period of 60 months, take $530 per month out of Harris's post-petition income and distribute this to the mortgagee in order to pay in full his mortgage arrears and also to other creditors to pay certain other debts. Pet. App. 3a-4a. On April 15, 2010, the bankruptcy court confirmed the plan. Pet. App. 30a.

Harris was unable to stay current with his mortgage payments and, in October 2010, his mortgagee moved to lift the automatic stay to foreclose on Harris's home. Pet. App. 4a. The bankruptcy court granted the mortgagee's motion, and the mortgagee began foreclosure proceedings. *Id.* In the meantime, Viegelahn continued to receive $530 per month from Harris's wages, but ceased making payments to the mortgagee, resulting in funds accumulating in Viegelahn's possession. *Id.*

On November 22, 2011, Harris voluntarily converted his Chapter 13 case to Chapter 7 under 11 U.S.C. § 1307(a), which allows a debtor to "convert a case under [Chapter 13] to a case under chapter 7 of this title at any time." *Id.* While proceeding voluntarily under Chapter 13, Harris's bankruptcy estate included property and earnings, such as his wages, acquired "after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12." 11 U.S.C. § 1306. In Chapter 7, however, a different rule applies: although a debtor's nonexempt property existing at the time his petition is filed is liquidated to pay creditors, all post-petition earnings are generally outside the estate and beyond the creditors' reach. Pet. App. 5a (citing 11 U.S.C. § 541(a)). At the time of the conversion, Viegelahn held $5,519.22 of Harris's post-petition wages that she had yet to distribute to Harris's creditors. Pet. App. 4a. After making a payment

to Harris's attorney, Viegelahn distributed the remaining funds to creditors. *Id.* Harris moved to compel the return of the funds on the ground that Viegelahn lacked the authority to distribute them after the conversion of his bankruptcy to Chapter 7. Pet. App. 5a. On February 29, 2012, the bankruptcy court granted Harris's motion and ordered the funds returned to him. Pet. App. 31a-32a.

The district court affirmed the bankruptcy court's order on appeal. Acknowledging that courts have differed on what to do with funds in the Chapter 13 trustee's possession at the time of conversion, the district court found "more persuasive the reasoning of those courts . . . that have concluded that post-confirmation, pre-conversion funds in a trustee's possession should be returned to the debtor." Pet. App. 43a. The court held that returning the funds to the debtor furthered the salient congressional policy of "encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7—without penalty if that attempt fails." Pet. App. 43a. The court reasoned that Congress's preference for Chapter 13 filings would be undermined by distributing post-petition funds to creditors upon conversion from Chapter 13 to Chapter 7, as those same funds would be beyond the reach of creditors had the debtor merely filed a Chapter 7 petition from the beginning. Pet. App. 45a. The

court further concluded that "there is nothing unfair about returning those funds to a debtor rather than to his creditors," since "[b]y attempting a Chapter 13 bankruptcy, a debtor attempts to pay his creditors more than they would have received under a Chapter 7 liquidation," and thus when "a debtor exercises his right to convert to Chapter 7, 'no reason of policy suggests itself why creditors should not be put back in *precisely the same position* as they would have been had the debtor never sought to repay his debts by filing under Chapter 13.'" Pet. App. 46a (quoting *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982)) (emphasis added).

Viegelahn appealed the district court's decision, and the Court of Appeals for the Fifth Circuit reversed, holding that Harris's post-petition earnings were properly distributed to creditors. Pet. App. 3a. The court of appeals rejected Harris's argument that Viegelahn lacked the authority to disburse funds once the case was converted, holding that after conversion "a Chapter 13 trustee still has the duty to turn over to the Chapter 7 trustee any records and property of the estate in her possession or control, and to file a final report and account," and that therefore section 348(e)'s termination of the Chapter 13 trustee's "service" upon conversion should not be taken "too literally." Pet. App. 10a. Noting that Viegelahn retained the "power and duty to wrap up certain affairs of

the estate," the court saw "no reason why" this would not include "distributing the funds remaining in her possession" after conversion. Pet. App. at 14a.

Finding "little guidance in the Bankruptcy Code as to whether undistributed funds held by the Chapter 13 trustee at the time of conversion should be returned to the debtor or distributed to creditors," the court of appeals looked instead "to considerations of equity and policy." Pet. App. 22a. The court disagreed with the district court's reasoning that returning the funds to the debtor is necessary to promote Congress's intent to encourage Chapter 13 filings, believing it "unlikely that a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7," since the debtor is only required to make payments up until the time of conversion. Pet. App. 24a. The court explained that, "because the debtor can choose to convert to Chapter 7 at any time and thereby avoid making any further payments under the Chapter 13 plan, he retains the power to prevent any additional wages from going into the hands of creditors." Pet. App. 25a. The Fifth Circuit further held that "distribution of the funds to creditors is supported by strong considerations of fairness." Pet. App. 26a. Focusing on the benefits of a Chapter 13 filing to debtors, such as retention of property, and the disadvantages

suffered by creditors, such as depreciation in the value of property during the time it remains in the debtor's possession, the court concluded that "the creditors' claim to the undistributed funds is superior to that of the debtor." Pet. App. 27a-28a.

SUMMARY OF THE ARGUMENT

When Congress included the provisions of Chapter 13 as part of the Bankruptcy Reform Act of 1978, its intent was to encourage debtors to opt "to repay their debts over an extended period [under Chapter 13] rather than to opt for straight bankruptcy liquidation and discharge [under Chapter 7]." H.R. REP. 95-595, at 5 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 5966. To facilitate the Chapter 13 repayment process, Congress provided that the bankruptcy estate in a Chapter 13 case would differ markedly from an estate in Chapter 7. *See* Pet. App. 36a. In Chapter 7 cases, the estate generally consists of all of the debtor's nonexempt property as of the date the petition is filed, but notably does not include the debtor's post-petition earnings. 11 U.S.C. § 541(a). Thereafter, the Chapter 7 trustee typically liquidates the property of the estate, distributing the proceeds to creditors, while the debtor obtains a discharge of his debts. In combination, these elements of the Chapter 7 process reflect the essence of the Chapter 7 bargain: in exchange for surrendering all of his nonexempt

property to the Chapter 7 trustee for liquidation, the Chapter 7 debtor keeps his future earnings and otherwise receives a "fresh start" in the form of the discharge of prior indebtedness.

In contrast, a Chapter 13 estate includes property "that the debtor acquires after the commencement of the case." Pet. App. 36a (quoting 11 U.S.C. § 1306(a)). That is because, under Chapter 13, the debtor is required to propose a plan to repay his debts over a three- to five-year period, typically using his post-petition earnings to make the payments. Pet. App. 35a (citing 11 U.S.C. § 1322(d)); *see also* 11 U.S.C. § 109(e) (limiting Chapter 13 to individuals with regular income). The role of the Chapter 13 trustee is also quite different from that of the Chapter 7 trustee. The Chapter 13 trustee generally does not liquidate anything, but rather supervises the Chapter 13 process and serves as a disbursing agent for purposes of making distributions under the terms of the debtor's plan. In combination, these elements of the Chapter 13 process reflect the essence of the Chapter 13 bargain: in exchange for keeping his property, the Chapter 13 debtor agrees in his plan to surrender a portion of his future earnings for a period of years to be used to pay his debts and the debtor does not obtain a discharge until after substantial completion of his plan.

Congress's desire to promote Chapter 13 proceedings reflects its judgment that, in

general, a Chapter 13 debtor "will pay his creditors at least as much and likely more than he would have under Chapter 7." Pet. App. 43a. On the other hand, because the Chapter 13 process turns on the debtor's contribution of future earnings for an extended period, it is *strictly* voluntary in nature. Creditors may not force a debtor into Chapter 13 involuntarily. Nor may they keep the debtor in Chapter 13 against the debtor's will. On the contrary, a debtor has the right to dismiss a Chapter 13 case, or to convert a Chapter 13 case to one under Chapter 7, at any time. 11 U.S.C. § 1307(a).

After the enactment of the Bankruptcy Code, courts were divided on the issue whether post-petition property that becomes part of a Chapter 13 estate would be included in the Chapter 7 estate if the case were converted, even though the property would not have been part of the Chapter 7 estate had the case been filed originally under Chapter 7. Pet. App. 5a-6a; *compare In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991) *with In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985). Congress addressed this conflict in 1994 by amending section 348 to state in amended form that, when a Chapter 13 case is converted to one under Chapter 7, "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion," provided that the debtor acts in

good faith. 11 U.S.C. § 348(f) (emphasis added). Congress explained that this clarification was intended to avoid the "serious disincentive to chapter 13 filings" that would occur if debtors risked losing property upon conversion that would have been safely outside the estate had they originally filed under Chapter 7. *See* H.R. REP. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. In amending section 348, Congress also approved the reasoning of *In re Bobroff*, in which the Third Circuit held that post-petition property ceases to be part of the estate upon conversion because, when a debtor converts from Chapter 13 to Chapter 7, creditors should be put in "*precisely the same position* as they would have been had the debtor never sought to repay his debts." *In re Bobroff*, 766 F.2d at 803 (emphasis added). Courts have subsequently recognized an important corollary to this rule, namely that debtors should not be penalized for attempting a repayment plan under Chapter 13, and should, like creditors, be placed "'in the *same economic position* they would have occupied if they had filed chapter 7 originally.'" *In re Brinkley*, 323 B.R. 685, 691 (Bankr. W.D. Ark. 2005) (quoting *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)) (emphasis added).

The decision below stands in conflict with the principle embedded in section 348(f) that, after conversion of a bankruptcy case from Chapter 13 to Chapter 7, debtors and creditors

should be placed in the same economic position that they would have been in had the case been filed under Chapter 7 from the outset. If Harris had originally filed a Chapter 7 petition, any wages that he earned after the date of his bankruptcy filing would have been excluded from the bankruptcy estate and would have belonged exclusively to him. 11 U.S.C. § 541(a). Section 348(f) directs the same result following the conversion of his case from a proceeding under Chapter 13 with respect to undistributed funds on hand at the time of conversion.[2]

Harris's entitlement to his wages is also directed by the principle of voluntariness that undergirds the Chapter 13 process as a whole and, similarly, the anti-peonage value expressed in the Thirteenth Amendment. In crafting the provisions of Chapter 13, it was Congress's intent that "[i]nvoluntary chapter 13 cases are not permitted" because "chapter 13 only works when there is a willing debtor that wants to repay his creditors" and "[s]hort of involuntary servitude" it would be "difficult to keep a debtor

---

[2] To be clear, Harris is not seeking the recovery of funds distributed to creditors under his Chapter 13 plan *prior* to the conversion of his case from Chapter 13 to Chapter 7. The analysis here, specifically application of the principle that, post-conversion, debtors and creditors should be put in the same position they would have occupied if the case had commenced initially under Chapter 7, involves the proper treatment of undistributed post-petition wages in the hands of the debtor or Chapter 13 trustee at the time of the conversion.

working for his creditors" when he is not willing to do so. H.R. REP. No. 95-595, at 322 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6278; S. REP. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818. As this Court has explained, involuntary servitude for the purpose of satisfying a civil debt obligation is a constitutionally proscribed form of peonage: "a status or condition of compulsory service, based on indebtedness." *Clyatt v. United States*, 197 U.S. 207, 215 (1905). To avoid any possibility of servitude against the debtor's will, Congress has directed that Chapter 13 cases must be strictly voluntary. As is relevant here, treating the debtor's undistributed post-petition wages as belonging to his creditors even though he has exercised his statutory right to exit the Chapter 13 arena is fundamentally inconsistent with this principle. For these reasons, the decision of the court below should be reversed.

ARGUMENT

A. Congress's Intent In Enacting The Current Bankruptcy Code Was To Encourage Chapter 13 Filings.

By operation of law, the filing of a bankruptcy petition under Chapters 7, 11, 12, or 13 of the Bankruptcy Code creates a bankruptcy estate. 11 U.S.C. § 541(a). In a proceeding under Chapter 7, the estate consists of "all legal or equitable interests of the debtor in property *as*

of the commencement of the case." *Id.* § 541(a)(1) (emphasis added). Notably, the Chapter 7 estate does not include the debtor's post-petition wages. In every Chapter 7 case, a Chapter 7 trustee is appointed to supervise the case, liquidate the debtor's nonexempt assets, and distribute the proceeds to creditors. *Id.* §§ 701, 704, 726. With certain exceptions, the debtor's remaining debts are discharged to enable the debtor to make a "fresh start" free of any obligation to his former creditors. *See, e.g., Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006) (observing that, among the "[c]ritical features of every bankruptcy proceeding," there is "the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts").

In a Chapter 13 proceeding, however, the estate is constituted differently: as is relevant here, it specifically includes all property and earnings acquired by the debtor "after the commencement of the case . . . ." 11 U.S.C. § 1306. In addition, the process is radically different. Rather than surrender his assets and receive an immediate discharge, the debtor is required to propose a plan to repay his debts over a period of between three to five years, and creditors must receive at least as much as they would have received in a Chapter 7 liquidation. *Id.* §§ 1322(d), 1325(a)(4). Unlike in Chapter 7, the Chapter 13 debtor's post-petition earnings are used to fund the plan and pay creditors. In return, the debtor is able to maintain possession

of his assets while paying off his debts. Pet. App. 36a ("The Chapter 13 bankruptcy tends to be favored by debtors who have fallen behind on secured loan payments, such as mortgages and car loans, since it enables the debtor to maintain possession of the property while catching up on payments through a court-approved repayment plan."); *see also* H.R. REP. 95-595, at 118 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6079 ("The benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets.").

By including Chapter 13 as part of the Bankruptcy Code, Congress made clear its intent to "encourage[] more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. REP. 95-595 (1977), at 5, *reprinted in* 1978 U.S.S.C.A.N. 5963, 5966; *id.* at 6078 ("The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used debtors should attempt repayment under Chapter 13. . ."). This preference reflects the congressional ambition that, under a Chapter 13 plan, "a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7." Pet. App. 43a. However, should the debtor be unable or unwilling to make the payments required under his Chapter 13 plan, section 1307 gives the debtor the right to convert to a Chapter

7 case at any time. 11 U.S.C. § 1307(a); H.R. REP. 95-595 (1977), at 428, *reprinted in* 1978 U.S.S.C.A.N. 5963, 6383. Importantly, conversion of a case "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." 11 U.S.C. § 348(a).[3] Rather, as section 348 makes plain, the Chapter 7 case is treated as though it had been commenced on the same date as the Chapter 13 proceeding. As amended in 1994, section 348 likewise treats the estate as though it had been constituted on the original filing date. As is relevant here, what this means is that, because a debtor's post-petition wages are not included in the Chapter 7 estate, undistributed earnings may not be used post-conversion to pay the claims of creditors, but rightfully belong to the debtor.

B. One Important Way That Section 348(f) Encourages Chapter 13 Filings Is By Ensuring That Debtors Are Not Penalized By Conversion From Chapter 13 To Chapter 7.

In the years immediately after the current Bankruptcy Code was enacted, courts were split on the issue whether post-petition property that had become part of a Chapter 13 estate should

---

[3] The "order for relief" is the order commencing a bankruptcy case upon or following the filing of the petition. *See* 11 U.S.C. §§ 301(b), 303(h).

remain part of the estate after the case is converted to Chapter 7 if the property would not have been part of the estate had the case originally been filed as a liquidation proceeding. Pet. App. 5a-6a. The Third Circuit, for example held that a debtor's tort claims that accrued while a Chapter 13 proceeding was pending did not remain a part of the estate after conversion to Chapter 7. *In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985). The court reasoned that "[t]his result is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation," because "[i]f debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." *Id.* If conversion does occur, the court held that "'no reason of policy suggests itself why the creditors should not be put back in *precisely the same position as they would have been had the debtor never sought to repay his debts. . . .*'" *Id.* (quoting *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982)) (emphasis added); *see also In re Boggs*, 137 B.R. 408, 410-11 (Bankr. W.D. Wash. 1992) (finding "no inherent inequity in refunding undisbursed wage contributions to debtors on conversion," and that "the Congressional policy of encouraging debtors to repay their creditors via Chapter 13 is

furthered by debtors (and their counsel) knowing they will not be penalized for attempting Chapter 13").

In contrast, the Seventh Circuit held that property inherited by the debtors after filing a Chapter 13 petition remained a part of the bankruptcy estate after the case was converted to Chapter 7, even though the property would not have been part of the estate had the debtor filed under Chapter 7 from the outset. *In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991). The debtors argued that section 348(a), which makes the filing date for a converted Chapter 7 case the date on which the original Chapter 13 petition was filed, required that property of their Chapter 7 estate be limited to property they owned when they initially filed their petition, excluding any property acquired during the Chapter 13 proceeding. *Id.* Acknowledging that this reading of section 348(a) was plausible, the court nonetheless held that "an equally good alternative from a purely semantic perspective is that conversion from Chapter 13 to Chapter 7 does not affect the bankrupt estate but merely assures the continuity of the case for purposes of filing fees, preferences, statutes of limitations, and so forth." *Id.* The court also rejected the policy argument that limiting property in a case converted from Chapter 13 to Chapter 7 to assets held by the debtor pre-petition encourages debtors to attempt to use Chapter 13, noting that "[the debtors'] position makes an *initial* filing

under Chapter 13 less risky, all right, but it also encourages conversions from Chapter 13 to Chapter 7." *Id.* The court concluded that "a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." *Id.*; *see also In re Calder*, 973 F.2d 862, 866 (10th Cir. 1992) ("[A]ll property in plaintiff's Chapter 13 estate—including any funds included pursuant to § 1306—are part of the postconversion Chapter 7 estate.").

Addressing this conflict, Congress amended section 348 to state that, when a Chapter 13 case is converted, "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A); Pet. App. 6a-7a. An exception to this rule exists for cases that are converted in bad faith; in such cases "the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." 11 U.S.C. § 348(f)(2).

As explained in the House Report accompanying this amendment, the intent behind it was to:

> clarify the Code to resolve a split in the case law about what property is

> in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. . . . This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

H.R. REP. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. The House Report further explained that, "to hold otherwise would create a serious disincentive to chapter 13 filings," as debtors would risk losing property upon conversion that would be safely outside the estate in Chapter 7. *Id.*

Following amendment of section 348, courts "uniformly agreed that Section 348(f)(1)(A) establishes that property acquired after the Chapter 13 filing and before discharge

under Chapter 7 is not part of the converted estate." *In re Stamm*, 222 F.3d 216, 218 (5th Cir. 2000). Moreover, courts widely accepted that the amendment "essentially codified the *Bobroff* rule." *In re Young*, 66 F.3d 376, 378 (1st Cir. 1995) (section 348(f)); *In re Sargente*, 202 B.R. 1023, 1025 (Bankr. S.D. Fla. 1996) (same). Thus, when a debtor converts from Chapter 13 to Chapter 7, creditors should be put in "*precisely the same position* as they would have been had the debtor never sought to repay his debts." *In re Bobroff*, 766 F.2d at 803 (emphasis added). Courts have likewise recognized that, upon conversion to Chapter 7, debtors should not be penalized for attempting a repayment under Chapter 13 and, like creditors, also should be placed "in the *same economic position* they would have occupied if they had filed chapter 7 originally.'" *In re Brinkley*, 323 B.R. 685, 691 (Bankr. W.D. Ark. 2005) (quoting *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)) (emphasis added); *see also In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997) ("The general purpose of § 348(f) was to equalize the treatment a debtor would receive under a Chapter 13 case that converted to a Chapter 7 case with the treatment the debtor would receive if he filed a Chapter 7 originally.").

Because property that the debtor acquires after the filing of a Chapter 7 petition would not become part of the bankruptcy estate in such a proceeding, courts have held in many contexts

that such property acquired during the Chapter 13 proceedings properly belongs to the debtor following conversion, and neither creditors nor the Chapter 13 trustee have any right to it. *See, e.g.*, *Taylor v. Burns*, 344 B.R. 523, 525 (W.D. Ky. 2004) (tax refund relating solely to post-petition wages earned during Chapter 13 proceeding was not part of Chapter 7 estate after conversion and debtors were not obligated to turn the refund over to the Chapter 7 trustee); *Farmer v. Taco Bell Corp.*, 242 B.R. 435, 440 (W.D. Tenn. 1997) (debtor's tort claim "arose after confirmation of the Chapter 13 plan but prior to the conversion to a Chapter 7 bankruptcy," and absent a bad faith conversion belongs to the plaintiff, not the trustee); *In re Stillwaggon*, No. 10-bk-12289, 2014 WL 1087898, at *3 (Bankr. M.D. Fla. March 19, 2014) (inheritance received after Chapter 13 petition was filed was not part of Chapter 7 estate after conversion); *In re Morrison*, 403 B.R. 895, 904 (Bankr. M.D. Fla. 2009) (life insurance proceeds received by debtor after filing Chapter 13 petition were not part of the estate upon conversion to Chapter 7 and the debtor was not required to turn property over to trustee); *In re Brinkley*, 323 B.R. at 691 (same). Moreover, after conversion to Chapter 7, a debtor's "right to exemptions is determined by facts as they existed on the date of the original bankruptcy petition." *In re Sandoval*, 103 F.3d 20, 23 (5th Cir. 1997) (debtor's homestead exemption determined by living arrangements at

the time of filing, not the time of conversion; *see also In re Alexander*, 236 F.3d 431, 433 (8th Cir. 2001) (same). Notably, as detailed by Harris, courts have held that property acquired during Chapter 13 proceedings belongs to the debtor following conversion regardless of whether the post-petition property is in the hands of the debtor or the Chapter 13 trustee at the time of conversion. *See* Pet. for Writ of Cert. at 17 n.5. The rationale of the decisions cited above applies in this case, and consistent with Congress's intent in amending section 348, Harris's undistributed post-petition earnings in this matter properly belong to him.

C. The Decision Below Is In Direct Conflict With The Purpose Behind Section 348(f).

In this case, the Fifth Circuit properly acknowledged that, "[a]fter the passage of § 348(f), it is clear that property acquired after the filing of a Chapter 13 petition, including wages, does not become part of the Chapter 7 estate upon conversion (absent bad faith)." Pet. App. 9a. Nonetheless, the court concluded that, after conversion, the Chapter 13 trustee retains the "power and duty to wrap up certain affairs of the estate," and saw "no reason why" this should not include "distributing the funds remaining in her possession" after the debtor had converted the case. Pet. App. at 14a. Likewise, the Fifth Circuit properly acknowledged that Congress's

intent in enacting the Bankruptcy Code was to encourage "debtors to attempt repayment through Chapter 13 and remov[e] disincentives that would discourage this," Pet. App. 22a, but held nonetheless that it was "unlikely that a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7." Pet. App. 24a. This is so, the court stated, because distributing post-petition wages to creditors according to the Chapter 13 plan upon conversion, rather than returning the funds to the debtor, does not penalize the debtor for filing under Chapter 13 or discourage Chapter 13 filings because "'it simply requires [debtors] to fully honor their obligation under a confirmed plan up to the point when they voluntarily wish to terminate the provisions of the plan and have their case dismissed or converted to a Chapter 7 case.'" *Id.* (quoting *In re Bell*, 248 B.R. 236, 240 (Bankr. W.D.N.Y. 2000)).

Respectfully, the Fifth Circuit's judgment conflicts directly with the text and purpose of section 348(f), as recognized in the better reasoned decisions. In a nutshell, it conflicts with the principle embedded in section 348(f) that, following conversion, debtors and creditors should occupy the same economic position they would have occupied had the case been filed under Chapter 7 at the outset with respect to any undistributed funds. Once again, it is clear

that, had Harris initially filed a Chapter 7 petition rather than a Chapter 13 petition, any wages earned after the date of filing would be excluded from the Chapter 7 bankruptcy estate and would belong to him. 11 U.S.C. § 541(a). Under the directive of section 348(f), Harris's undistributed wages also should be his following the conversion of his case. By approving the post-conversion distribution of Harris's post-petition wages to his creditors, the Fifth Circuit has improved the creditors' position at Harris's expense contrary to the text and purpose of the relevant provisions of the Code. Whatever administrative duties Viegelahn may have had following Harris's conversion, they cannot include the authority to distribute funds under a defunct Chapter 13 plan in contravention of the statutory scheme Congress has prescribed.

D. The Decision Below Conflicts With the Principle that Chapter 13 Proceedings Are Strictly Voluntary.

The Thirteenth Amendment commands that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1. As noted in *The Civil Rights Cases*, the Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," 109 U.S. 3, 28 (1883), and by its terms bars

"peonage," defined as "a status or condition of compulsory service, based on indebtedness." *Clyatt v. United States*, 197 U.S. 207, 215 (1905). As the Court has explained, the Amendment "is a charter of universal civil freedom for all persons" with the ambition "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

Reflecting a similar set of principles, both the House and Senate Reports accompanying the Bankruptcy Code explain that "[i]nvoluntary chapter 13 cases are not permitted" because "chapter 13 only works when there is a willing debtor that wants to repay his creditors" and "[s]hort of involuntary servitude" it would be "difficult to keep a debtor working for his creditors" when he is not willing to do so. H.R. REP. No. 95-595, at 322 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6278; S. REP. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818. While forcing a debtor against his will to contribute his post-petition wages to a particular bankruptcy procedure for the sake of paying his debts may not be precisely the same thing as peonage *per se*, the two are at least closely aligned. Both involve the dramatic stripping of the debtor's personal agency. Under a coercive bankruptcy procedure in which the debtor is

forced to contribute his post-petition earnings to the process (as opposed to his compelled labor), it is true that the debtor might elect to forego working altogether, and thus avoid the contribution of his wages in this way. But by the same token, the debtor would also typically lack the ability to support himself, and thus be forced to work. In practical terms, the difference between the two forms of compulsion is therefore likely to be largely illusory. In any event, regardless of whatever formal differences exist between peonage and a bankruptcy procedure that compels the involuntary contribution of a debtor's post-petition earnings, Congress has elected to avoid even the semblance of involuntary servitude by rendering the Chapter 13 process strictly voluntary.

Consistent with this congressional choice, the debtor's obligation in Chapter 13 to contribute his post-petition wages to the repayment of his debts goes hand in hand with his intention to voluntarily submit to the Chapter 13 process. When the debtor has formally indicated his inability or unwillingness to continue with that process, and has exercised his right to convert his case to a proceeding under Chapter 7, his obligation to contribute his post-petition wages rightfully comes to an end. At that point, his undistributed wages are properly his and may not be distributed to his creditors, and certainly not by a statutorily

disenfranchised Chapter 13 trustee under the terms of a defunct Chapter 13 plan.

CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Kate M. O'Keeffe
Phillip A. Spinella
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Amicus Curiae

February 2, 2015